BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

CASIMIRA MYRIE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,025,825
LOGISTICS & ENVIRONMENTAL SUPPORT SERVICES	)	
	)	
Respondent	)	
AND	)	
	)	
WAUSAU UNDERWRITERS INSURANCE COMPANY	)	
	)	
Insurance Carrier	)	

ORDER

Respondent appeals the August 10, 2007 preliminary hearing Order of Administrative Law Judge Bryce D. Benedict. Claimant was awarded benefits in the form of psychiatric counseling with clinical psychologist R. E. Schulman, Ph.D., until certified as having reached maximum medical improvement (MMI).

Claimant appeared by her attorney, Bruce Alan Brumley of Topeka, Kansas. Respondent and its insurance carrier appeared by their attorney, Andrew D. Wimmer of Overland Park, Kansas.

The Appeals Board (Board) adopts the same stipulations as the Administrative Law Judge (ALJ), and has considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing held on November 30, 2005, with attached exhibits; the transcript of Regular Hearing held on June 28, 2007, with attached exhibits; the Deposition of Travis Oller, D.C., taken on July 17, 2007, with attached exhibits; the Deposition of board certified orthopedic surgeon Phillip L. Baker, M.D. taken on July 25, 2007, with attached exhibits; the Deposition of board certified orthopedic surgeon Edward J. Prostic, M.D., taken on August 6, 2007, with attached exhibits; and the transcript

of Preliminary Hearing held on August 8, 2007, with attached exhibits; along with the documents filed of record in this matter.[1]

ISSUES

1. Did claimant suffer accidental injuries arising out of and in the course of her employment with respondent? Respondent asserts the physical requirements of claimant's job with respondent were not sufficient to have caused or contributed to claimant's shoulder injuries. Respondent alleges claimant stood while doing her job and the testimony of board certified orthopedic surgeon Edward J. Prostic, M.D., verifies that claimant's job would not have contributed to the shoulder injuries if claimant performed those activities while standing. Claimant argues that claimant performed the job activities while sitting and the above-the-shoulder reaching caused or contributed to claimant's shoulder injuries. Claimant also cites the testimony of Dr. Prostic in support of her position.

2. Did claimant's alleged accidental injuries lead to her current need for psychiatric counseling? Respondent argues that claimant has a long history of psychiatric problems, including depression, which are the reason for her current problems. Claimant argues the depression she currently suffers from may have preexisted the current injuries, but the current injuries and claimant's resulting unemployment situation clearly intensified and aggravated the depression.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant worked for respondent in its kitchen facility at Fort Riley for 29 years. As a result of those work activities, claimant developed significant upper extremity problems which led to two carpal tunnel releases to her right upper extremity and three carpal tunnel releases to her left upper extremity, pronator tunnel syndrome decompression bilaterally, and ulnar nerve transposition once on the right upper extremity and twice on the left upper extremity. These work-related problems were settled with respondent in 2004. As a result

[1] The Deposition of board certified orthopedic surgeon Lowry Jones, Jr., M.D., taken on August 14, 2007, with attached exhibits, was not considered as it was taken after the date the Judge's Order was entered.

of these work-related problems, claimant was returned to work for respondent with restrictions. Respondent met those restrictions by returning claimant to light duty, working in the Fort Riley mess hall. Claimant worked the computer at the mess hall, entering identification information as people came through the line at the mess hall. This job could be done either sitting or standing. If done sitting, it would require claimant to reach above her shoulder level while keying in the information.

Claimant began experiencing problems in her right shoulder in October 2005, while inputting information into the mess hall computer as people came through the line to pay. Claimant testified that she began experiencing a pain "like a loaded shot in my shoulder".[2] Claimant reported the injury to her supervisor, and she was referred for treatment. Claimant has been treated by several doctors since the initiation of these problems.

The dispute in this matter centers around whether claimant performed her job while standing or sitting. Respondent contends claimant performed her job while standing. Thus, she would not have to reach above her shoulder while inputting the information. Claimant contends her job was done while she sat on a chair. This would require that she reach above shoulder height while inputting the information into the computer. The conflict is complicated by the testimony of Dr. Prostic, who examined claimant on February 19, 2007, at the request of the ALJ. In his report of that date, Dr. Prostic determined that the repetitious minor trauma to claimant's right shoulder was not sufficient to have caused or contributed to claimant's work injuries. Dr. Prostic was originally under the impression that claimant performed her job while standing. Thus, the reaching would not be above the shoulder. Claimant's attorney wrote the doctor a letter dated June 27, 2007, and advised that claimant performed the activities in question from a seated position, which required that she reach above her shoulder on a regular basis and regularly extend her right arm over 18 inches from her body. Based on that information, Dr. Prostic issued a supplemental letter dated July 9, 2007, wherein he stated the activity described would "cause or contribute to rotator cuff disease".[3]

This matter is further complicated by the fact that both claimant and respondent are correct regarding claimant's inconsistent testimony in describing her job duties. At the preliminary hearing held August 8, 2007, claimant testified that she did her job while standing.[4] At the preliminary hearing held November 30, 2005, claimant testified that she did her job while sitting.[5] Perhaps the most accurate testimony came at the regular hearing

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[2] P.H. Trans. (Aug. 8, 2007) at 10.

[3] Prostic Depo., Ex. 3.

[4] P.H. Trans. (Aug. 8, 2007) at 22-23.

[5] P.H. Trans. (Nov. 30, 2005) at 13.

held on June 28, 2007, when the following conversation occurred between claimant and respondent's attorney:

> Q. Your job was to enter data into a computer, is that correct?
>
> A. Yes, and punching social security three time [*sic*] a day.
>
> Q. And the place that you entered the computer you were in a standing position, is that correct?
>
> A. Yes. Sometimes I sit down for my job and sometime [*sic*] I stand up. And I also stretch my hand to punch in the social security number.[6]

Claimant has not worked since October 2005, partly due to her injuries and partly due to the fact respondent lost the contract with Fort Riley. While claimant had worked in the same position with several employers at the Fort, the new contract owner did not have a position within claimant's restrictions, and claimant is now unemployed. Claimant has looked for jobs with several potential employers, but to date has been unsuccessful in her search. Partly as a result of her inability to find a job, and partly due to preexisting problems, claimant has developed increased depression. As noted by the ALJ in the Order of August 10, 2007, claimant is, at least in part, responsible for this depression due to her inability or unwillingness to obtain a job. Nevertheless, the ALJ ordered claimant to be seen by clinical psychologist R. E. Schulman, Ph.D.

Claimant was originally examined by Dr. Schulman on June 7, 2007. It is not clear from this record who made the original referral to Dr. Schulman. Dr. Schulman diagnosed claimant with depression, which he determined is caused by her injuries and subsequent surgery. He found claimant's problems directly related to her inability to work at the place she had "devoted herself to for so many years".[7]

PRINCIPLES OF LAW AND ANALYSIS

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?

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[6] R.H. Trans. at 13.

[7] P.H. Trans. (Aug. 8, 2007), Cl. Ex. 1.

2. Did the injury arise out of and in the course of employment?

3. Did the worker provide timely notice and written claim of the accidental injury?

4. Is there any defense that goes to the compensability of the claim?[8]

This Board Member must first consider whether it has jurisdiction to consider the referral of claimant for psychological counseling. Claimant argues that this is not an issue over which the Board has jurisdiction on appeal from a preliminary hearing Order, citing the Board's decision in *Alleva*[9] as justification for its position. In *Alleva*, the Board determined that the award of psychological treatment constituted medical treatment and thus, under K.S.A. 44-534a, the Board would not have the jurisdiction to consider that type of referral as an issue on appeal from a preliminary hearing Order. However, *Alleva* was determined in 1998. The Board, since that time, has reconsidered the issue of psychological treatment and whether it is solely a question of medical care, or whether it can also give rise to questions that would be jurisdictional for the Board to consider on appeal from a preliminary hearing Order. The Board determined in *Coggs*[10] that it did have jurisdiction over the issue of psychological referrals at preliminary hearings as the question of whether a psychological condition is directly traceable to the work-related accident is a question that goes to the compensability of the condition or injury. Stated another way, it gives rise to a dispute as to whether the injury, in this case, a psychological condition, arose out of and in the course of the employment.

Accordingly, this Board Member finds jurisdiction of this appeal on that limited question of whether claimant has a psychological condition that is directly traceable to her work-related accident and the resulting physical injury.

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[11]

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[8] K.S.A. 44-534a(a)(2).

[9] *Alleva v. Wichita Business Journal, Inc.*, No. 202,618, 1998 WL 599406 (Kan. WCAB Aug. 11, 1998).

[10] *Coggs v. Swift Eckrich, Inc.*, No. 1,019,223, 2005 WL 1983412 (Kan. WCAB July 2005).

[11] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[12]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[13]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[14]

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate a preexisting condition. This can also be compensable.[15]

Based on the testimony of claimant and Dr. Prostic, this Board Member determines that claimant has satisfied her burden of proving that she suffered accidental injuries arising out of and in the course of her employment with respondent. Claimant performed her job both while standing and sitting. The activity while seated would aggravate claimant's shoulder condition, leading to the ongoing shoulder problems. The overcompensation for the right shoulder led to the subsequent problems with claimant's left shoulder. It is not necessary for claimant's job to cause her problems, just that they contribute to the development of the problems.

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[12] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[13] K.S.A. 2005 Supp. 44-501(a).

[14] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[15] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[16]

With regard to claimant's request for ongoing counseling, the Kansas Court of Appeals has set certain criteria which must be met before benefits for a traumatic neurosis can be awarded in a workers compensation situation. As set forth in *Love*,[17] the following three elements must be met for a traumatic neurosis claim to be compensable:

1. a physical injury;

2. symptoms of traumatic neurosis; and

3. these symptoms are directly traceable to the physical injury.[18]

As noted by both Dr. Prostic and Dr. Schulman, claimant's ongoing depression is directly related to the injuries suffered while working for respondent and claimant's subsequent inability to work because of those injuries. This Board Member finds the Order of the ALJ should be affirmed with regard to the referral of claimant to Dr. Schulman.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[19] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

This Board Member finds that claimant did prove that she suffered accidental injuries arising out of and in the course of her employment with respondent through a series of accidents culminating on October 10, 2005, and the need for ongoing psychological counseling is directly traceable to those injuries.

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[16] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[17] *Love v. McDonald's Restaurant*, 13 Kan. App. 2d 397, 771 P.2d 557 (1989).

[18] *Id.* at 398.

[19] K.S.A. 44-534a.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Bryce D. Benedict dated August 10, 2007, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of November, 2007.

BOARD MEMBER

c: Bruce Alan Brumley, Attorney for Claimant
Andrew D. Wimmer, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge